Supreme Court, U.S.
FILED

99 203 JUL 29 1999

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

RALPH COYLE, WARDEN,
Petitioner,

v.

DAVID A. MAPES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether appellate counsel is constitutionally required to pursue all non-frivolous claims on direct appeal?

LIST OF PARTIES

Petitioner was the Warden of the Mansfield Correctional Institution at the time of the filing of petitioner's appeal in the court of appeals.

Respondent in this action is David Mapes, who is currently in custody at the Mansfield Correctional Institution.

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The Attorney General of Ohio, on behalf of Ralph Coyle, Warden, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A-2, is reported at 171 F.3d 408 (6th Cir. 1999). The opinion of the district court, Pet. App. A-47, is unreported. The report and recommendation of the magistrate judge, Pet. App. A-49, is unreported. The opinion of the Ohio Supreme Court, Pet. App. A-123, is reported at 19 Ohio St. 3d 108 (1985). The opinion of the state court of appeals, Pet. App. A-148, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1999. A petition for rehearing was denied on April 30, 1999. Pet. App. A-1. This petition for a writ of certiorari has been filed within 90 days of that decision, as provided in Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

1. The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to ... have the assistance of counsel for his defense."

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any state deprive any person of life, liberty, or property, without due process of law."

INTRODUCTION

This petition presents a question, which this Court may use to clarify an issue for the Nation. The question is whether effective counsel need raise all non-frivolous claims on a direct appeal. In this case, the court of appeals employed a multi-factored test, derived from several court of appeals decisions, to conclude that Respondent might not have received the effective assistance of appellate counsel even though appellate counsel winnowed out weaker arguments to pursue what reasonably appeared to be his twelve (12) strongest claims. Pet. App. A-39.

STATEMENT OF THE CASE

Respondent David A. Mapes was found guilty of aggravated murder and aggravated robbery in an Ohio trial court in 1983. In the course of a robbery, Respondent shot and killed a bar owner. A person previously solicited to assist in the crime by Respondent stepped forward and identified Respondent as a suspect. Based upon this information, a photo array was shown to a survivor who selected Respondent as resembling the gunman and thereafter positively identified him as the gunman.

Respondent admitted that he had participated in the robbery, but claimed that he was not the gunman. However, Respondent's accomplice testified that Respondent was the shooter, as did another survivor. Respondent's wife and a neighbor testified that Respondent owned a sawed-off shotgun like the one used during the robbery, and police found shells, of the same type used to kill Allen, in a drainpipe hole at Respondent's apartment.

The trial judge determined that Respondent was guilty of the aggravating specification of the two counts of

aggravated murder for violation of Ohio Revised Code Section 2929.04(A)(5) which provides:

> Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

The trial court then sentenced Respondent to death.

Respondent took a direct appeal to the Ohio Supreme Court and raised twelve assignments of error with four sub-parts. The Ohio Supreme Court affirmed Respondent's conviction.

Respondent filed his habeas petition in 1991, prior to the effected date of the Antiterrorism and Effective Death Penalty Act. Among other things, he alleged claims of ineffective assistance of appellate counsel.

In his report, Pet. App. A-49, the magistrate judge determined that Respondent's appellate counsel failed to raise one meritorious claim on direct appeal. The district court adopted the magistrate judge's recommendation that the trial court's supplemental jury instruction precluded the jury from considering the mitigating evidence surrounding a prior conviction.

Thereafter, the court of appeals discovered four new instances of ineffective representation, Pet. App. A-37, as follows:

> (1) trial counsel apparently did no mitigation, and presented no mitigation defense save an unsworn and uncorroborated statement by Mapes that he was not the New Jersey triggerman, even though corroborating evidence almost certainly existed; (2) over trial counsel's objection, the trial judge erroneously prohibited the sentencing jury from considering Mapes' only mitigating evidence, effectively requiring the jury to recommend death; (3) the trial judge erroneously required the jury to reject the death penalty unanimously before considering a life sentence; and (4) over trial counsel's objection, the court accepted a death recommendation from the jury despite one juror's obvious hesitation.

The court of appeals then affirmed the district court's issuance of the writ of habeas corpus inventing an eleven factor, multi-circuit list to determine whether appellate counsel performed with reasonable competence. In so ruling, the court of appeals found that all factors weighed in favor of granting the writ. The court of appeals also considered the underlying merits of the claims in its analysis. The court of appeals ordered the district court to conduct an evidentiary hearing to evaluate appellate counsel's performance in light of its multi-faceted test.

REASONS FOR GRANTING THE WRIT

An appellate counsel is not constitutionally required to pursue all non-frivolous claims on direct appeal. A court of appeals should not second guess the reasonable strategy of appellate counsel to winnow out weaker claims in

pursuit of what reasonably appears to be the most substantive appellate issues.

On direct appeal in the Ohio courts, Respondent's appellate counsel winnowed out a multitude of possible arguments to assert what reasonably appeared to be Respondent's twelve most substantive claims. The District Court held appellate counsel to be ineffective for failing to raise an additional non-frivolous claim. The majority of the Court of Appeals then expanded the District Court's opinion by identifying four additional non-frivolous claims which were not pursued on direct appeal, and remanded the case for an evidentiary hearing on appellate counsel ineffectiveness. Pet. App. A-35. In a concurring and dissenting opinion, Judge Siler concluded that each of the four new issues identified by majority opinion lacked merit. Pet. App. A-42.

It is not the constitutional function of a court of appeals to second guess an appellate counsel's strategic decision to winnow out arguably substantive claims in favor of what reasonably appears to be the strongest available appellate arguments. Here, the court of appeals post-hoc analysis of appellate counsel strategy conflicts with the command of this Court's decisions in *Jones v. Barnes*, 463 U.S. 745 (1983) and *Murray v. Carrier*, 477 U.S. 478 (1986). The court of appeals further disregarded the dictates of *Strickland v. Washington*, 466 U.S. 668 (1984), in favor of a new ad hoc eleven point ineffective assistance of counsel test gleaned from various circuit decisions. The lack of merit in the additional four identified appellate claims further highlights the flaw in the court of appeals' decision.

This Court has not squarely addressed the applicable test for determining ineffective assistance of appellate counsel with respect to claims that appellate counsel chose not to pursue in favor of other substantive claims. This Court

should answer this question, by clarifying and extending the standards articulated in *Jones v. Barnes*, 463 U.S. 745 (1983) and *Strickland v. Washington*, 466 U.S. 668 (1984).

This Court held in *Jones v. Barnes*, 463 U.S. 745, 752-753 (1983) that appellate counsel must recognize, "the importance of winnowing out weaker arguments on appeal" and focus on key issues in order to avoid the danger of "burying good arguments...in a verbal mound made up of strong and weak contentions." *Id.* (citations and portions omitted). Here, appellate counsel heeded this standard by raising important, key issues on direct appeal. As noted by the court of appeals, "Appellate counsel brought twelve assignments of error, indicating that winnowing of issues was not a primary consideration." Pet. App. A-39.

Both *Jones* and *Strickland* suggest that appellate counsel are constitutionally effective when substantive issues are raised on appeal. In this case, even the court below agreed that appellate counsel chose twelve substantive claims to pursue on appeal. However, employing a unique eleven-part test, which mixed subjective elements and unprecedented prongs to evaluate appellate counsel effectiveness, in direct conflict with this Court's *Strickland* analysis, the court of appeals nevertheless found possible ineffectiveness in counsel's failure to include four additional claims. Pet. App. A-37.

The court of appeals analysis allowed the court to "short-circuit" the doctrine of procedural default in favor of *de novo* merits review **of underlying claims which were never presented to the state courts**. For example, with the benefit of hindsight, the court of appeals deemed an omitted jury instruction claim meritorious, despite the fact that the claim was not supported by Ohio law at the time of appellate counsel's briefing. Pet. App. A-37. Concurring Judge Siler

noted the absurdity of this point, "It is not ineffective assistance of counsel when counsel fails to anticipate a change in the law." Pet. App. A-45. *Cf. Lockhart v. Fretwell*, 506 U.S. 364 (1993).

Contrary to this Court's *Strickland* dictates, in its opinion the court of appeals conducted a subjective analysis of appellate counsel's strategy. *Strickland*, however, requires a habeas court to determine if an attorney's performance is *objectively* reasonable - the inquiry does not hinge on an individual attorney's ability, and subjective knowledge.

Moreover, the analysis of the new claims proposed by the court of appeals majority decision, as correctly noted by Judge Siler, Pet. App. A-44, is simply wrong. After demonstrating the lack of merit in the four new claims propounded by the appellate court, Judge Siler cogently observed, "Appellate counsel did a commendable job on direct appeal in this case. He raised twelve issues. Although, in hindsight we now criticize the brief for not raising other issues, the only question which arguably should have been raised is that pertaining to the consideration of mitigation evidence surrounding the homicide in New Jersey." Pet. App. A-45-6.

Furthermore, the one substantive claim embraced by both the district court and court of appeals which was not raised by appellate counsel, is based on a misreading of the record. Indeed, the underlying action for which appellate counsel was found to be ineffective concerns a trial court response to a jury question, which was entirely proper. Contrary to the lower court decisions, the trial court did **not** exclude Respondent's New Jersey conviction from its clear and unambiguous charge to the jury of their right to consider any mitigating circumstances:

Now, we use the term "aggravating circumstances." What is aggravating circumstance? In this particular case, the aggravating circumstance is precisely set out in the specifications contained in Count 1 and Count 2 known as the Fourth Specification in each count of aggravated murder, to-wit: Specifications 4 of Count 1 and 2.

That the defendant, David Mapes, was convicted in Passaic County Court, New Jersey, Case No. 908-72 of murder on June 30, 1972, of which an essential element was the purposeful killing of another.

I have used the words, and the attorneys have used the words "mitigating factors."

Mitigating factors are factors that, while they do not justify or excuse the crime, nevertheless in fairness and mercy, may be considered by you as extenuating or reducing the degree of the defendant's blame or punishment.

These mitigating factors include, but are not limited to, the nature and circumstances of the offense, the history, character and background of the offender, and any and all mitigating factors, including those mitigating factors, those statutory mitigating factors, but not limited thereto.

(Tr. 4178-79).

The jury instruction necessarily informed the jury of their right to consider mitigating circumstances from Respondent's New Jersey conviction. The instruction further correctly informed the jury that mitigating circumstances from the New Jersey conviction could not be used to negate the finding that Respondent had been convicted of an offense that had the essential element of which was the purposeful killing or attempted killing of another. Similarly, the "improper" question and response, to which no objection was made by Respondent's trial counsel, reads as follows:

> THE COURT: Ladies and gentlemen of the jury, I am in receipt of a number of questions purported to me by the jury. And I have interrupted your deliberations to return you here to the courtroom because of these questions for further instructions.
>
> * *
>
> Now, as to the first question, which reads as follows:
>
> "Are we just to consider evidence presented to us in the sentencing hearing or testimony and evidence from both the trial and sentencing hearing as regarding the mitigating factors?"
>
> Of course, this is the fourth time I have explained this orally to you. If you find from all the evidence at the sentencing hearing and at the trial that the defendant has gone forward with some evidence of mitigation, and you find that the evidence exists as to the mitigation, then you are to consider it.
>
> The next question read:

"Does the seven mitigating factors as it applies to Spec 4 cover this case and the prior conviction?"

I have at least three times explained this to you. You are required to accept without reservation the fact that the defendant was convicted in 1972 of murder. And an essential element of which was the purposeful killing of another.

The mitigating factors do not apply to the prior murder conviction at all. I might say that this is the aggravating circumstances that he was found guilty of when he waived the jury to me. And you are here to compare any mitigating circumstances that you find in this case with that aggravating circumstance.

Mr. Londell Smith, does that satisfy you?

THE FOREMAN: Yes

THE COURT: All right. Thank you. You may resume your deliberations.

(Tr. 4215-17).

The district court's condemnation of the above instruction was based upon the faulty premise that the trial court instructed the jury as a matter of law that they were precluded from considering the circumstances surrounding the prior conviction. This conclusion is based upon a strained interpretation of the trial court's words which seeks

to change the true issue of Respondent's aggravated circumstance.

The issue at trial with respect to Respondent's death penalty specification, and the issue in this appeal, is **not** whether Respondent was the triggerman in the 1972 New Jersey murder conviction. Rather, the issue is whether Respondent had been convicted of a offense that had an essential element of which was the purposeful killing of or attempt to kill another as defined by Ohio Revised Code Section 2929.04(A)(5). In this regard the trial court did no more than correctly instruct the jury that under Ohio law they could not use the mitigating circumstances from Respondent's New Jersey murder conviction to find that said conviction did not constitute an aggravated circumstance.

In stark contrast to *Sumner v. Shuman*, 483 U.S. 66 (1987), wherein this Court struck down a statute that mandated the death penalty for an inmate convicted of murder while serving a sentence of life without parole, the jury here was **not** barred from considering any mitigating circumstances from Respondent's New Jersey conviction. Rather, the jury simply could not consider the evidence of mitigation to erode the existence of an aggravating circumstance. This "limitation" was in accord with both state and constitutional law. Contrary to the holding of the lower courts, appellate counsel was not constitutionally required to append this claim to the twelve substantive claims which were raised on direct appeal.

More is certainly required than a mere hindsight evaluation of claims that an appellate attorney chose not to raise than the test articulated by the court of appeals. The test truncates this Court's *Strickland* analysis into a scenario in which, irrespective of the substantive claims pursued on

direct appeal, appellate counsel should have included an additional defaulted claim on direct appeal.

This petition therefore presents this Court with an opportunity to articulate the standard for evaluating the winnowing process of appellate counsel in capital cases, particularly with respect to whether all non-frivolous claims need be raised on direct appeal. Although *Strickland*, *Jones* and *Murray* do not adequately answer this question, the test employed by the court of appeals is contrary to the dictates of each of said cases.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests this Court to grant the writ of certiorari.

Respectfully submitted,

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July 29, 1999